KWANG HAP SIANG LTD.

v.

PENTADBIR TANAH DAERAH GOMBAK

HIGH COURT MALAYA, SHAH ALAM
MAHADEV SHANKAR J
[CIVIL APPLICATION NO. 15-4-1989]
25 JUNE 1991

LAND LAW: *Acquisition of land - Compensation for alleged injurious affection - Two petrol stations proposed - Approval depended on ten Government Departments - Plan amended - Petrol stations left out - Land Acquisition Act 1960 ss. 2(d), 8.*

On 3 March 1977 compulsory acquisition of a unified portion of two lots (Lot 10245 and Lot 10769) owned by the plaintiff was gazetted under s. 8 of the Land Acquisition Act 1960 (the Act) for the construction of the Kuala Lumpur-Karak Highway. In May 1968 the Planning Department issued a plan amending a previous plan. The amended plan showed a proposal of two petrol stations in Lot 10269. In August 1968 there were some changes to the plan but the petrol stations were unaffected. In order to develop the area, the plaintiff had to obtain approval from ten different departments and finally the State Authority. In December 1976, the plaintiff submitted a plan proposing for conversion of the land use from agriculture to residential land. No petrol stations were shown in this plan.

The plaintiff contends that the true basis for the valuation of the acquired portion of Lot 10269 is that at the material date it was potential petrol station land and that compensation should be accordingly awarded.

Held:

[1] The valuation of the subject property must be on the basis of highest and best use which the property could be put to. It is fair to accept the owner's proposal to incorporate the two petrol station sites. The price of the land is however subject to demand, the type and intensity of development within the catchment area and the status of the planning approval of the subject land.

[2] The standard practice to determine element of injurious affection is to compute a "before and after acquisition" valuation of the property affected.

[3] The omission to provide for the two petrol stations did not in fact result in any loss to the landowner. Indeed the increase in the number of shop houses approved by the authorities resulted in a gain.

[4] The Court can only provide compensation for injurious affection as a result of the acquisition. The landowner submitted his amended plan in December 1977 wherein he abandoned the petrol stations well before the acquisition was gazetted. There is no evidence whatsoever that the amended plan was forced upon the landowner as a result of the acquisition. What happened in March 1977 cannot injuriously affect what was a *fait accompli* in December 1976.

[5] The plaintiff's claim also fails because it has failed to prove its case. The plaintiff did not provide any comparative calculations to show that the conversion from petrol stations to proposed shophouses in fact resulted in "damages".

[Plaintiff's claim dismissed with costs.]

Legislation referred to:
Land Acquisition Act 1960, ss. 2(d), 8

Other source referred to:
Halsbury's Laws of England, Vol. 8, paras. 258 & 259

For the plaintiff - J. Kanaparan; M/s. Shearn Delamore & Co.
For the defendant - Hishamuddin

JUDGMENT

Mahadev Shankar J:

This is an application under the Land Acquisition Act 1960 (the Act) for compensation for alleged injurious affection.

The plaintiff owned a block of two contiguous lots of land (the said land) each roughly rectangular in shape comprised in CT26521 for Lot 10245 measuring 9.9737 acres and CT26544 for Lot 10269 measuring 10.0062 acres in the Mukim of Batu in the District of Gombak. The two lots lay longitudinally roughly on a north south axis. The road from Kampong Batu Caves to Ulu Gombak ran alongside the northern boundary.

On 3 March 1977, the compulsory acquisition of a unified portion of both lots was gazetted under s. 8 of the Act for the construction of the Kuala Lumpur-Karak Highway. The area to be acquired constituted 6.7078 acres of Lot 10245 (which lay on the western side of the block). Approaching from the south the portion to be acquired started as a rectangular strip running wholly within Lot 10245 along its eastern boundary. About halfway up it widened and fanned out so as to cut off the whole of the northern road frontage of Lot 10245, and a triangular portion of Lot 10269 measuring 1.7107 acres. The acquisition of a similar shaped piece of land beyond the northern boundary suggests that the intention of the authorities was to make this wider area a major road junction with the usual entry and exit points from the existing Kampong Batu Caves - Ulu Gombak Road.

The material date for the purposes of valuation and assessment of compensation is the date of the Gazette notification under s. 8 that is 3 March 1977.

On 28 June 1967 the State Town and Country Planning Department of Selangor (hereafter referred to as the Planning Department) had prepared a layout plan (B5/5152) suggesting that the said land could be utilised for terrace houses. There was no provision either for shop houses or petrol stations.

On 20 May 1968 the Planning Department issued an amended plan (B5/5152B) showing a proposal for two adjacent petrol stations in place of the row of terrace houses on the north eastern edge of Lot 10269.

On 30 August 1968 the Planning Department made some changes to the Plan B5/5152 whereby the frontage lots were changed from terrace houses to shop houses. This plan B5/5152C is dated 2 December 1968. The two proposed petrol stations were unaffected.

This plan merely projected the plaintiff's vision as to how the area could be developed. To translate this vision to reality the plaintiff had to obtain the final approval of the State Authority which would not in any event have been given unless the plaintiff had obtained preliminary approvals from some ten other Government Departments to detailed submissions to be made to them.

Whether the proposed development would in fact take place depended on the detailed submissions of the landowner and the confirmed written approvals of some ten other Government Departments. The final authority after these approvals had been obtained was the state. No approval had ever been given by the State Authority or any other Government Department to the Plan B5/5152C because none had been applied for by the plaintiff.

Between December 1968 and 3 March 1977 is a gap of over eight years. At the material date the said land was still agricultural land, being used as a poultry farm with a feedmeal factory and a battery factory at the front portion. The existing buildings on Lot 10245 were not approved by the authorities, and considered to be illegal structures. Lot 10269 was vacant land overgrown with bushes and shrubs. There was no sub-division in progress either.

On 17 December 1976 the plaintiff did submit a plan R/S/38/761A proposing the conversion of land use from agricultural to residential land and for sub-division of Lot 10269. This plan anticipates the acquisition gazetted on 3 March 1977, by following it exactly. No petrol stations are shown in this plan.

The private architect who drew this plan was not called to give evidence. There is no material whatsoever before the Court that anybody in authority compelled the plaintiff to make the submission in this form.

The evidence before the Court is that it is not the practice of the Planning Department to publicise any intended acquisition prior to actual gazetting. So it is an open question whether the plaintiff's submission influenced the outline of the intended acquisition or whether it was the other way round.

The plan showed 18 shop houses and 102 terrace houses. These 18 shop houses replaced the 2 petrol stations shown in the plan B5/5152C dated 2 December 1968. After the acquisition became public knowledge by virtue of the Gazette on 3 March 1977 the Planning Department counterproposed a layout plan for consideration by the State Authority (Plan B5/5152D dated 30 April 1977). This plan increased the number of shop houses from 18 to 30. The number of terrace houses however was reduced from 102 to 55.

The Collector was faced with a claim for RM660,000 for Lot 10245 and RM352,057 for Lot 10269. He awarded RM463,031.25 for both lots. The plaintiff appealed to this Court. On 3 April 1990 by consent the Collector's award was increased to RM613,031.25 in respect of both lots and for injurious affection to Lot 10245 inclusive of interest and costs.

By consent also the parties agreed that the remaining claim for injurious affection in respect of Lot 10269 be left for trial by this Court.

The plaintiff contends that the true basis for the valuation of the acquired portion of Lot 10269 (the acquired portion) is that at the material date it was potential petrol station land, and compensation awarded accordingly.

The only ground for so urging was that the plaintiff had indicated this potential in Plan B5/5152B on 20 May 1968 and retained this intention on 2 December 1968. But the plaintiff's suggestion that it continued to intend to realise this potential as up to 17 December 1976 or even that Plan 5152B was a viable project, is wholly unconvincing. The affidavit of T.C. Koh does nothing to dispel this finding. Indeed the solitary letter dated 30 October 1974 from the plaintiff's bankers confirm this because in spite of the bank's insistence on information as to pending application for conversion or sub-division, not a shred of evidence has been produced to show that such applications were made. Nor is there any evidence of any tentative enquiries to or from any petrol distributing company about these lots.

There is also no evidence to prove that the plaintiff was forced to abandon its intention to have these two petrol stations when it submitted its amended plan on 17 December 1976. Admittedly there is an astonishing congruence in the plan submitted that day and the acquisition which came two and a half months later but no evidence has been produced from any material witness who could disclose how or why this came about.

Consequently the only permissible inference is that the plaintiff unilaterally opted to develop the land in the manner shown in their plan of 17 December 1976 because it was then felt that this was the most profitable way of utilising the land.

We have looked at all the authorities cited by both parties and also the passages in Vol. 8 of *Halsbury's Law of England* (Compulsory Acquisition of Land) paras. 258 and 259 on "Potential Use of Land to be regarded."

The critical date here is 3 March 1977. The relevant statutory provision is s. 2 (d) of the Act which requires the Court to take into consideration the following matters and no others:

> (d) the damage, if any, sustained or likely to be sustained by the person interested ... by reason of the acquisition injuriously affecting his other property ...

Since the development plan which was prepared and submitted to the Planning Department in 1968 incorporated the two (2) petrol stations, we are of the opinion that the owner's then intention in planning to have the petrol stations on Lot 10269 was genuine even though no approval has been given by the authorities.

On the proposal submitted by the owner in 1976 we noted that there was a change to the development proposed (compared to the 1968 submission that is after eight years) but the most interesting point to observe is the pattern of the proposed layout. The layout submitted clearly made provision for certain sectors of the land likely to be affected by the proposed acquisition even though the acquisition was only gazetted in 1977. We thus strongly believe that the intended acquisition must have become known to the owner at the time of preparing the 1976 proposal. It is therefore reasonable on the part of the owner to exclude the two petrol station sites as originally included in the 1968's submission due to the possible lost of direct access.

In view of the aforesaid scenario we are of the opinion that valuation of the subject property must be on the basis of highest and best use which the property could be put to.

Thus in the absence of the subject acquisition, it is fair to accept the owner's proposal to incorporate the two petrol station sites which did have the potential for such use and the owner must have sensed the pulse of the property market then. The price for such land however is subject to demand, the type and intensity of development within the catchment area and the status of the planning approval of the subject land.

On the acquisition of injurious affection that is the reduction in value (if any) suffered by the remaining land of the owner as the result of the acquisition, an assessment of the injury is only possible by computing a **before** and **after valuation** that is doing a valuation of the property before the subject acquisition took place and then another valuation of the property after the acquisition has been made.

We observed that the development proposal for Lot 10269 before acquisition incorporated the following:

Before Acquisition Potential

Development Type		No. of Units
a) Terrace House (20' x 80')	:	63 units
b) Terrace House (20' x 70')	:	47 units
c) Shophouse (20' x 70')	:	3 units
d) Petrol Stations (Land area about 10.672 sq. ft. net each)	:	2 units

The Planning Department has then counter proposed an after acquisition layout plan incorporating the following:

After Acquisition Potential

Development Type		
a) Terrace House (20' x 80')	:	55 units
b) Shophouse (22' x 80')	:	30 units

The standard practice adopted to determine element of injurious affection is to compute a 'Before and After Acquisition' valuation of the property affected as follows:

Valuation

Before Acquisition

1) *Terrace House (20' x 70')* 47 units @ RM12,450 per unit	:	RM 585,150
2) *Terrace House (20' x 80')* 63 units @ RM12,950 per unit	:	RM 815,850
3) *Shophouse (20' x 80')* 3 units @ RM25,500 per unit	:	RM 76,500
4) Two (2) Petrol Stations @ RM10 per sq. ft.	:	RM 213,440
Total	:	RM1,690,940
Development stage discount factor	:	0.25
Value of land at material date	:	RM 422,735

After Acquisition

1) *Terrace House (22' x 80')* 55 units @ RM13,500 per unit	:	RM 742,500
2) *Shophouse (22' x 80')* 30 units @ *RM25,500 per unit	:	RM 765,000
Total	:	RM1,507,500
Development stage discount factor	:	0.25
Add compensation for the 10.7107 acres of land acquired	:	RM 94,000
		RM 470,875

On the facts and the inferences therefrom, which have been set out aforesaid, which also represent the specific views of both the assessors in this case, it is the unanimous view of this Court that the omission to provide for the two petrol stations proposed in the 1968 plan did not in fact result in any loss to the landowner. Indeed the increase in the number of shop houses approved by the authorities resulted in a gain of RM48,140 on the above calculations.

There is another aspect of this case which leads to the same result. By law this Court can only provide for compensation for injurious affection as a **result** of the acquisition. In our case the landowner submitted his amended plan in December 1976 wherein he abandoned the petrol stations well before the acquisition was gazetted. There is no evidence whatsoever before us that the amended plan was forced upon the landowner as a result of the acquisition. What happened in March 1977 cannot injuriously affect what was a *fait accompli* in December 1976!

This claim also fails because the plaintiff has failed to prove its case.

Three sales were referred to by the plaintiff's valuer in Jalan Kelang Lama and Jalan Pahang all about 5 kms. from Kuala Lumpur. These three lots were all small lots and had been bought by petrol companies. Each had ready road frontage. As we have already remarked as far as the subject sites were concerned there was no evidence even of any tentative interest by any petrol company. In addition to that, it is observed from plan B5/5152B that even though the sites were adjacent to the Kg. Batu Caves/Ulu Gombak Road, there was no direct access to that road because of a set back for green belt leaving a distance of 106 feet from the site to the road boundary. There was no infrastructure whatsoever at the time of the acquisition. So even if there was some hypothetical possibility of user as petrol service stations, the cost of providing the infrastructure is a debit factor to be taken into account.

But the plaintiff did not provide any comparative calculations before us to show that the conversion from the petrol service stations to proposed show-houses in fact resulted in "damage". Indeed the calculations done by the assessors each of whom may be regarded as having the necessary expertise in these matters went to show that what the plaintiff did do in December 1976 was to maximise the use to which the land could be put, and the acquisition when it took place in March 1977 fell in line with its own objectives.

In these circumstances we would dismiss this claim with costs. The plaintiff must also pay each assessor his fees to be notified to the plaintiff's solicitors by the Senior Assistant Registrar. The deposit for assessor's fees made by the defendant shall be returned to the defendant.

Also found at [1992] 1 CLJ 146